IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARTIN B. BREIGHNER III and
KATHRYN BREIGHNER,

Plaintiffs/Appellants,

v.

Docket No.123529

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., a Michigan non-profit corporation,

Defendant/Appellee.

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

Appellee concurs with the statement set forth by Appellant.

STATEMENT OF QUESTIONS PRESENTED

I. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION AN AGENCY OF LOCAL SCHOOL DISTRICTS AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court:	Did not answer.
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

II. IS THE MICHIGA HIGH SCHOOL ATHLETIC ASSOCIATION A BODY CREATED BY STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court:	Did not answer.
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

III. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT?

The Trial Court answered:	"Yes."
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	"No."
The Court of Appeals answered:	"No."

IV. WHEN A TRIAL COURT DETERMINES AND ORDERS THAT AN ORGANIZATION IS A PUBLIC BODY SUBJECT TO THE FREEDOM OF INFORMATION ACT BUT DOES NOT SPECIFICALLY ORDER THE ORGANIZATION TO MAKE A RESPONSE, IS IT IMPLICIT IN THE ORDER THAT A RESPONSE IS REQUIRED?

The Trial Court:	Failed to specifically answer.
Plaintiffs/Appellants answered:	"Yes."
Defendant/Appellee answered:	Was not addressed.
The Court of Appeals answered:	Was not addressed.

COUNTER STATEMENT OF FACTS.

A. Facts Giving Rise to the Complaint.

Jordan Breighner, as an enrolled student at Harbor Springs High School, chose to join the high school downhill ski team for the winter competition of 2000-2001. A condition of a school participating in MHSAA tournaments is that all members of that school team must participate in regular season (non-tournament) competition in accordance with certain rules limiting the number of contests in that regular season so that a level competitive playing field is maintained in preparing for the post-season tournament.

In the sport of Alpine ski, each school's team is allowed fifteen competitions and four scrimmages. In addition, during the regular season, an individual may participate in a maximum of two outside contests while not representing his or her school. If the competitive limit is exceeded by an individual, he or she is no longer eligible for the next three school meets which in this case happened to include the MHSAA regional ski meet.

In the competitive world of Alpine ski there is another sponsor of competitive events and the sport rule making body, the Central United States Ski Association (CUSSA). At the beginning of each ski season the MHSAA/CUSSA liaison officer, usually a high school ski coach, after consultation and determination of the coaches whose schools sponsor ski, notifies the MHSAA of what CUSSA events may be included in the fifteen designated competitions called "sanctioned races." All others are by definition non-sanctioned. Nonetheless, the competitive limitation allows a ski competitor to participate in no more than two non-sanctioned events during the season and remain eligible to participate on these school ski teams without violating the limits of competition. In other words, one may compete either on the school team or may choose to compete in other competitive events that are not sponsored by the school. A clear choice of the student is involved.

The list of agreed sanctioned events is not only in the hands of every ski school but was created by those schools' own action. Information is then presented to every student athlete participating and his/her parents at a pre-season meeting. This procedure has been followed by the ski sponsoring MHSAA member schools for over twenty years without incident until the present case.

This case arises because Jordan Breighner exceeded his allowed non-sanctioned race participation limitation.

B. Facts Relating to the MHSAA.

The MHSAA is a Michigan non-profit non-stock membership corporation. No one and no entity owns any part of the MHSAA. It is a voluntary membership organization wherein schools desiring membership contract with the MHSAA to assist them in the regulation of interscholastic athletic eligibility and competition and the administration of uniform competition rules established by the membership leading to eligibility to compete in post-season interscholastic athletic tournament competition in some sports that MHSAA member schools sponsor. Some of the general membership services the MHSAA provides at no cost to member schools are:

1. Catastrophic accident medical insurance for all eligible student-athletes grades 7-12, all practices and regular season contests. Cost to MHSAA is $50,000 per year.
2. National Federation playing rules books in all sports. Cost to MHSAA is more than $100,000 to purchase and mail.
3. Rules meetings for coaches and officials – more than 150 meetings in 2003-04.
4. Printed *Bulletin* – multiple copies to each school, 7 editions per year.
5. Annual School Directory – multiple copies to each school.
6. Annual Officials Directory – multiple copies to each school.
7. Mentor/Stripes – each publication is prepared and posted online 3 times per year.
8. New school visits.

9. New coach orientation.

10. Sportsmanship mini-grants. Cost to the MHSAA is $12,000, every other year.

11. Women in Sports Leadership mini-grants. Cost to the MHSAA is $12,000, every other year.

12. And at less than full cost the MHSAA provides its members:

a. Programs for Athletic Coaches' Education, around the state throughout the year.
b. Athletic Director In-Service program, around the state throughout the year.
c. Sportsmanship Conference every other year.
d. Women in Sports Leadership Conference, every other year.
e. Officials registration, recognition and training.

Some of the post-season membership services the MHSAA provides are:

1. The MHSAA designs, orders, ships and pays for trophies and medals, all sports, all levels of MHSAA tournaments.

2. At its expense only, the MHSAA registers, conducts rules meetings for, rates and assigns contest officials at all levels of MHSAA tournaments which require officials.

3. At its expense only, the MHSAA convenes and trains managers for its tournaments in most sports.

4. At its expense only, the MHSAA convenes committees in each sport to decide the policies and procedures for tournaments, all sports, all levels.

5. MHSAA staff direct all tournaments, attend tournaments for all sports at all levels, and provide on-site management at the culminating events.

6. The MHSAA assists schools in their administration of eligibility and contest rules to assure a level playing field for those member schools which wish to enter MHSAA tournaments.

7. The MHSAA provides merchandise at tournaments, the sale of which benefits local hosts.

8. MHSAA staff receive hundreds of calls, letters, faxes and e-mails daily regarding tournament policies and procedures. It would be impossible to conduct the tournaments without this central clearinghouse.

As part of sponsoring post-season tournaments the MHSAA selects the tournament sites, assigns teams to those sites, establishes criteria, assigns contest officials, conducts required meetings throughout the state for representatives of teams and officials of contests, publishes

complete programs and/or provides copy for programs, coordinates radio and TV rights and clearances – paying all costs associated with the production of tournaments and assuming the complete risk of loss in the event receipts do not equal expenditures. Alpine ski produces no receipts. (Of the 24 tournaments sponsored, only football, and basketball produce positive cash flow utilized to fund the other tournaments that have negative cash flow). In addition, the tournament host school (if the tournament is at a member institution's facilities) is paid a percentage of the gate or a fee in the amount of at least $300.00 even if the tournament expenses exceed the gate revenue.

There are other numerous athletic associations that oversee competition rule uniformity and provide support services in school sponsored sports. Some schools in Michigan belong to organizations other than the MHSAA, and most MHSAA member schools belong to one or more associations in addition to the MHSAA.

Some are high school associations for a single sport:

e.g., regionally:

Central Alpine Ski Conference

Central Michigan Swim League

Coastal Swim Conference

Great Lakes High School Hockey Conference

Great Northern Hockey Conference

Greater Northwestern Cross Country Conference

Independent Swimming Conference

Independent Tennis League

Lake Michigan Ski Conference

Lake Superior Hockey Conference

Michigan Interscholastic Hockey League

Michigan Metro Hockey League

Michigan Prep Hockey League

Mid-Michigan Gymnastics Conference

Mid-Michigan Women's Golf League

Mid-Michigan Wrestling Conference

Northern Michigan Soccer League

Southeast Michigan Ski League

Southeast Michigan Gymnastics League

Southwest Michigan Swim League

Southwestern Michigan Hockey League

Valley Soccer Association

Wolverine Football Conference

e.g., statewide:

Michigan Interscholastic Horsemanship Association

Michigan Scholastic Lacrosse Association

Michigan Water Polo Association

Some are multi-sport organizations:

e.g., regionally:

Central State Activities Association

Lenawee County Athletic Association

Oakland Activities Association

Southern Thumb Athletic Association

Twin Valley Association

Western Lakes Activities Association

West Michigan Home School Athletic Association

e.g., statewide:

Accelerated Christian Education Conference

Michigan Alternative Athletic Association

Michigan Association of Christian Schools

e.g., national:

Association of Christian Schools International

There are state championships conducted by other organizations in some sports for which the MHSAA has some involvement:

e.g., basketball

soccer.

There are state championships in a wide variety of sports for which the MHSAA has no involvement:

e.g., equestrian through Michigan Interscholastic Horsemanship Association

boys gymnastics

lacrosse through Michigan Scholastic Lacrosse Association

water polo through Michigan Water Polo Association

It is true that the MHSAA is the oldest, largest and most successful of the Michigan athletic associations in existence today; this is because it has been responsive to the needs and desires of schools in their mission of growing athletic programs and providing maximum participation opportunities for students in an educational environment. However it is by no means the only statewide athletic association and membership is still voluntary. Even if there were no practical alternative to membership, which there clearly is, that fact does not mean the

MHSAA controls its members. NCAA v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454 102 L.Ed. 2d 469 (1988).

The MHSAA is exempt from taxation pursuant to 501(c)(3) of the Internal Revenue Code.

The MHSAA is a private entity. That status has been addressed both by the Attorney General and the Michigan Court of Appeals:

1. On August 8, 1978, the Attorney General delivered Opinion No. 5348 which states in part:

> "As a private nonprofit corporation, the MHSAA has the same rights and privileges as any other private nonprofit corporation ..."

2. On April 8, 1986, the Attorney General delivered Opinion No. 6352 opining that the MHSAA is a private organization not subject to the provisions of the Open Meeting Act because it is not a public body.

> "MHSAA is not an agency or instrumentality of the state. The tournaments sponsored by MHSAA are a private corporate activity ...
>
> The Representative Council of the MHSAA and its executive committee are not state or local legislative or governing bodies. They are not empowered by the state constitution, statute, charter, ordinance, resolution or rule to exercise authority. The Representative Council rather, is a board of directors of a private, nonprofit corporation which has as its members both public and private schools. The Open Meetings Act does not purport to apply to private, nonprofit corporations."

3. In August of 1986 the Michigan Court of Appeals reiterated that the MHSAA is a private organization:

> "The MHSAA is a private non-profit corporation."
> Berschback v. MHSAA, 154 Mich. App. 102, 110 (1986).

The relationship between the members and the corporate entity, the MHSAA, was well delineated in:

1. Cardinal Mooney v. MHSAA, 437 Mich. 75, 81:

> "We also find relevant to the fact that the member schools of the MHSAA have voluntarily agreed to submit the MHSAA's regulations ... as a condition of their membership. Furthermore, compliance with MHSAA rules on the part of a student athlete is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the MHSAA."

2. Kirby v. The MHSAA, 459 Mich. 23, 38-39 (1998) states within the context of post season tournaments:

> "Schools agree, for the purpose of having orderly competition, to let the MHSAA set the rules and govern the tournaments."
>
> ***
>
> "Such an agreement is analogous to the consent given by a party entering arbitration, who agrees in advance to be bound by ruling that is within the scope of the arbitrator's authority, provided the ruling is not clearly violative of the law."
>
> FN 17 of Kirby states in material part:
>
> "Thus it is a creature of its members, with no independent authority over schools or students."

There is no governmental oversight of the MHSAA by any branch or agency of state government.

The MHSAA derives 90% of its revenue from public sale of tickets to MHSAA post-season tournaments in some (but not all) interscholastic sports activities schools sponsor and 10% from tournament concessions, program sales, officials' registration fees and investment income. The MHSAA derives NO revenue from competition between schools during regular season play. Any revenue derived from those regular season events is 100% retained by those schools.

The tournament revenue is generated by sales of admission tickets (gate receipts) to the general public who wish to view the post-season tournament event.

The admission tickets may be sold directly by the MHSAA or the school (or other venue) may sell those tickets to the general public on behalf of the MHSAA. Deducting the associated

costs of the tournament to the host facility and their share of the revenues or stipend, as the case may be, schools which collect ticket sale revenue on behalf of the MHSAA remit the balance of those sales directly to the MHSAA. The MHSAA bears all risk of loss at all tournament venues. If expenses exceed revenues, the MHSAA sends the deficit dollars to the school sponsoring the tournament venue. When the tournament is scheduled at a school, university or public arena, such as the Silverdome, the MHSAA bears all risk of loss. Neither the host nor contestant schools bear the risk of loss at an MHSAA sponsored tournament.

MHSAA member schools pay NO membership dues and NO tournament entry fees. In fact, schools pay absolutely nothing TO the MHSAA except for publication costs (for more than the quantities already given to the member institution as part of the membership benefit) and meeting expenses – usually the cost of lunch (not for materials or presenters).

Despite the settled law, the lower court decided as an issue of first impression that revenue derived from tournament ticket sales to MHSAA sponsored post-season tournaments really represents the money of the schools. [Citing Brentwood Academy v. TSSAA, 531 U.S. 288 (2001): "The association does not receive the money from the schools, but enjoys the schools' money making capacity as its own."] The trial court concluded:

> "In a reasonable common sense construction, this constitutes a governmental grant or subsidy to the defendant. This public funding is how defendant is primarily, chiefly, and principally funded." Opinion p. 7, l. 21-24.

The trial court thus ruled that gate receipts from ticket sales to the general public constitute indirect public funding making the MHSAA a public body and therefore subject to the Freedom of Information Act.

The MHSAA timely prosecuted an appeal from the grant of summary disposition. The Court of Appeals reversed, holding that the MHSAA (a) was not a public body but in fact a private corporation, (b) was not an agent of the school district, and (c) is not funded by or

through state or local authority (schools) and thus the MHSAA was not subject to the Freedom of Information Act.

The dissent failed to recognize that schools neither directly nor indirectly pay for the multiplicity of services they are provided by the MHSAA in addition to the payment of all costs and expenses associated with the production of tournament competition. The dissent also failed to realize that if the MHSAA did not provide post-season tournament competition, no individual school could by themselves engage in tournament competition, i.e., there would be no opposing team to play with.

The dissent's logic [and that of Brentwood Academy, supra] that the MHSAA enjoys the schools' money-making capacity is erroneous because:

1. Schools have no money-making capacity. Schools' money comes from state taxation and tuition. Schools do not earn money – they spend it.

2. School sports have no money-making capacity. Schools make up deficits for sports from revenue that comes from state taxation and tuition with participation fees ("pay for play"), 50/50 raffles, fund-raisers, advertising and sponsors. Schools do not earn money through sports – they lose it.

3. If the MHSAA is receiving school money because the general public pays an admission to see individual players compete, then a small extension of that logic would require that the spectators' money really belongs to the contestants. If that were the case, there would be no amateur tournament competition because the contestants would be paid. If all the money went to contestants there would be no money to fund the tournaments sponsoring enterprise.

4. The underlying premise of the dissent is misplaced because (a) it assumes that the dicta of Brentwood Academy on the funding issue is correct – which it is not, (b) it tacitly confuses the issue of "state actor" with state funding, and (c) it assumes that Judge Enslen's

decision in Communities For Equity, which is stayed by order of the Sixth Circuit Court of Appeals pending appellant review, is good authority.

The decision of the Court of Appeals should be affirmed.

PREAMBLE

FREEDOM OF INFORMATION ACT (FOIA)

The FOIA is an act "to provide for public access to certain public records of public bodies." 1976 PA 442. "In enacting the FOIA, the Michigan Legislature made it public policy that citizens are entitled to complete information concerning the affairs of their government so that they can fully participate in the democratic process." Sclafani v. Domestic Violence Escape, 255 Mich App 260; 660 NW2d 97 (2003). MCL 15.231(2) provides an express statement of the public policy, or legislative intent, behind the FOIA:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

The FOIA defines "public body" in MCL 15.232(d) as follows:

> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or *agency thereof.*
>
> (iv) Any other body which is *created by state or local authority* **or** which is *primarily funded by or through state or local authority.*
>
> (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(d) (emphasis added).]

This Court has recognized that MCL 15.232(d)(iv) has been described as a "catchall" provision. *Sclafani, supra, 100.*

I.

THE MHSAA IS NOT AN AGENT OF ITS MEMBERS.

The Court of Appeals properly ruled that since FOIA does not define agency, that it is permissible to consult dictionary definitions. In addition, the Court of Appeals cited St. Clair Intermediate School District v. Intermediate Education Association/Michigan Education, 480 Mich 540, 557-558; 581 NW 2d 707 (1998) for the proposition that:

> "It is a fundamental principal of Hornbook agency law that an agency relationship arises only where the principal "has the right to control the conduct of agent with respect to matters entrusted to him.""

Plaintiffs/Appellants apparently agree with this proposition as they cite St. Clair Intermediate School District, supra, for the very proposition herein stated.

Plaintiffs/Appellants then argue that the school districts have the right to control the conduct of the MHSAA because the MHSAA admitted it in its answer to the Plaintiffs/Appellants' allegation that "defendant's members control the policies, conduct and actions of the defendant corporation."

In a political sense Plaintiffs/Appellants' statement is true. The membership votes for people who wish to become members of the Representative Counsel, the organization's governing body. In a political sense, ultimate control of any organization's policies and actions are governed at the ballot box. In a democratic republic, the ballot box controls who will be the representatives and thus the ballot box theoretically controls what goes on at the legislative arena. Plaintiffs/Appellants, however, spin a political reality into a legal theory that will not fit the legal mold.

Plaintiffs/Appellants further wish to spin the reality of any membership organization "that the organization is its membership" to advance some theory that the membership thereby

controls the membership organization and that the membership organization is thus the agent of the members. All of which is to demonstrate that somehow the MHSAA is an agent of its membership namely, the schools, to fit into the definitions of FOIA coverage as an agent. Every membership organization is a collective association that comes together for some common purpose and in a political sense, the organization is its members. This is not unlike saying the United States Government is the coalition of 50 sovereign states that have come together for a specific purpose and have agreed that the law of the enterprise is federal law without surrendering the member sovereignty as states. But in that situation it can hardly be said that the federal government is an agent of any state or a coalition of all of the states. No state has the individual or collective right to control the United States Government with respect to matters entrusted to it.

In the instant case, the Court of Appeals was correct that:

> "The school districts, each on its own accord, has to come together in the MHSAA in order to enjoy both collective and individual benefits. That said, the MHSAA independently governs itself through an elective body of representatives of its member schools. The school districts themselves have no control (as principals) over the actions of the MHSAA either individually or in the aggregate. Moreover, no one individual school or school district can control the MHSAA since the MHSAA is controlled by its own board of directors. Hence, no one school district or even all school districts taken and considered as a whole have the ability or right to control the actions of the MHSAA. Therefore, the MHSAA is not an agent of the school districts and does not meet the definition of 'public body' under MCL 15.232(d)(iv)."

The MHSAA Membership Resolution has no words that state or imply that it authorizes the MHSAA to exercise powers in the place of schools. Schools do not delegate their independent authority by resolving to adopt a uniform set of rules under which athletic competition should be conducted.

The MHSAA is not an agent of Plaintiff. The nature of the contractual relationship between the membership in the MHSAA was defined in Kirby v. The MHSAA, 459 Mich 23, 38-39.

It is also defined in the *MHSAA Handbook* at p. 14:

ANNUAL CONTRACT

> "In Michigan, schools make for themselves the rules which serve and support interscholastic athletics. The rules cover hundreds of policies and procedures for administration of local programs.
>
> In addition, schools have the option to adopt rules of qualification into the postseason tournaments conducted by the MHSAA. MHSAA rules – prepared by the elected representatives of member schools (Representative Council) – are not intended to govern regular season competition, but to determine the qualifying standards, terms and conditions for MHSAA postseason tournaments.
>
> An ancillary but still important benefit is that by adopting these tournament qualifying rules, schools gain a greater degree of standardization for their regular season competition.
>
> For MHSAA member schools, these and other agreements are published in the *MHSAA Handbook*: and each year the local governing boards of member schools sign a Membership Resolution, a contract really, that they will enforce those rules locally, while the MHSAA agrees that the rules will not be changed during that school year."

The foregoing is to demonstrate any lack of logic to Plaintiffs/Appellant's' principal proposition that "if the school districts do not have the ability to delegate their authority over sports, the sporting events of the MHSAA, then by joining the MHSAA and contracting with it to perform athletic oversight functions, the MHSAA must be an agency of its member schools." The first part of the proposition is true. Schools cannot delegate their authority for the governance of interscholastic athletics at their institution. However, what claims to follow from that statement is not true because the membership resolution is not a contract for the MHSAA to perform athletic oversight functions at that institution or for that institution. The MHSAA cannot be an agent of that member school or the member schools that comprise the membership

of the association. If the last proposition is granted, which the Plaintiffs/Appellants agree to (that the schools cannot delegate their authority) then that statement would seem instead to dictate that the MHSAA cannot be an agent of the member schools because of the schools inability to delegate such authority to an agent.

Plaintiffs/Appellants' theory that the MHSAA is subject to the Freedom of Information Act because it is an agent of a school fails both legally and logically.

II.

THE MHSAA IS NOT A BODY CREATED BY STATE OR LOCAL AUTHORITY.

The parties agree that the Michigan High School Athletic Association (MHSAA) is a Michigan non-profit corporation with its principal offices located in Ingham County, Michigan (Plaintiffs' Complaint, paragraph 2, 3, Docket Entry No. 1, Defendant's Answer paragraph 2, 3, Docket Entry No. 6). The Attorney General of the State of Michigan delivered Opinion No. 6352 dated April 8, 1986 opining that the Michigan High School Athletic Association, Inc. is a private organization and not subject to the provisions of the Opening Meetings Act because it is not a public body.

In August of 1986 the Michigan Court of Appeals reiterated that the Michigan High School Athletic Association is a private organization:

> "... the MHSAA is a private, non-profit corporation." Berschback v. Michigan High School Athletic Association, 154 Mich. App. 102, 110 (1986).

The MHSAA cannot be construed to be a public body within the meaning of the Freedom of Information Act. By its very language, the Act does not purport to apply to private non-profit corporations. Public bodies are defined in MSA 15.232(d) as follows:

(d) "Public body" means any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

NONE OF THESE DEFINITIONS APPLY TO THE MHSAA.

There are three cases in Michigan that stand for the proposition that the Freedom of Information Act only pertains to public bodies as defined by the act:

(1) In Perlongo v. Iron River Cooperative TV Antenna Corporation, 122 Mich. App. 433 (1983), the Michigan Court of Appeals analyzed the Freedom of Information Act definition of a public body [MCL 15.232(d)] and the Open Meetings Act definition of public body [MCL 15.262(a)] and concluded that the Defendant's Articles of Incorporation showed that the corporation was a non-stock non-profit corporation that was not "created" by state or local authority. The Perlongo Court further concluded that while some members of the Board of Directors were members of the City Commission, that did not establish that the corporation was either created by the city or that the city and the organization were one and the same. This case held as follows:

> "The fact that the corporation was given a nonexclusive franchise to operate within the city and was governed by a fully adopted city ordinance does not alone make it a public body empowered by the city. . . . The granting of a license or a franchise does not make defendant corporation a public body. Finally, the corporation is funded by membership subscriptions and not by public funds.
>
> ***

> The fact that a utility is regulated by a state body does not convert that utility from a private utility company to a public body. . . .
>
> Defendant corporation is substantially similar to other cable television companies and airwave television stations. These are private companies, albeit heavily regulated by the FCC, and are not subject to the Freedom of Information Act or the Open Meetings Act."

(2) The next judicial inquiry into the question of what entities are covered by the Freedom of Information Act because of funding issues appeared in the case of Kubick v. Child and Family Services of Michigan, Inc., 171 Mich. App. 304 (1988). The Kubick focus was primarily on the issue of defining a public body for purposes of FOIA coverage through the "public funding mechanism" or "fee for services," neither of which is relevant to the MHSAA. See Article III below.

(3) Most recently, the Court of Appeals had an opportunity to revisit whether or not an entity was a public body and thus subject to the requirements of the Freedom of Information Act because of funding methodologies. In State Defender Union Employees v. The Legal aid and Defender Association of Detroit, 230 Mich. App. 426 (1998), the Court first observed that the defendant was a private nonprofit corporation and that the plaintiff was a labor organization representing attorneys employed by the defendant. In reviewing the trial court's ruling, the Court of Appeals stated as follows:

> "The trial court ruled that defendant is not "primarily funded" by government sources because it only received money from governmental entities in exchange for rendering professional services to indigent clients." . . .

It is clear that otherwise private organizations may be subject to FOIA coverage under circumstance specified in MCL 15.232(d)(iv).

The FOIA states:

> (d) 'Public body' means:
>
> > (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

Plaintiffs/Appellants claim that the MHSAA, although private, fulfills the statutory requirement because the MHSAA was created by state or local authority – schools - and thus falls with the coverage of FOIA by virtue of MCL 15.232(d)(iv):

"any other body which is created by state or local authority ..."

The relevant facts are:

1. No statute creates the MHSAA.

2. No school is signatory to the Articles of Incorporation.

3. No one owns an interest in the MHSAA. It is a non-stock non-profit membership association which charges no fees for membership.

4. No one is compelled to belong to the MHSAA. Membership is strictly voluntary.

5. No independent authority is exercised by the MHSAA over its member schools or students.

6. No public powers are possessed or exercised by the MHSAA.

7. No public benefits are enjoyed by the MHSAA.

8. If the MHSAA were dissolved, the proceeds of its assets must be distributed to other IRC 501(c)(3) organizations – not necessarily the then current member schools. This is mandated both by its Articles of Incorporation on IRC 501(c)(3).

9. No governmental institution exercises oversight over the MHSAA.

Under this set of facts it is not possible to conclude that the MHSAA was created "by state or local authority."

Kirby, supra, stated at p. 37: "Formal athletic competition is also typically governed by an external body that sets rules and governs the competition, subject to the agreement of teams and competitors." The structure of that body, the associational entity, is necessarily independent of its membership. The associational organization was created by third parties to serve the

independent and interdependent needs of the membership entities that those entities could not by themselves fulfill.

The MHSAA does not argue that a private organization cannot be subject to FOIA. The MHSAA is cognizant of the holding of Jackson v. Eastern Michigan University Foundation, 215 Mich. App. 240, (1996). The foregoing discussion of private versus public structure is but to illuminate the fact that the MHSAA is not a public body within the statutory definition and to develop the proposition that the MHSAA was not "created by state or local authority" as was correctly decided by the majority of the Court of Appeals (Opinion p. 7, l. 2-4).

III.

THE MHSAA IS NOT PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY.

The circuit court ruled that gate receipts from ticket sales to the general public constitute indirect public funding making the MHSAA a public body by virtue of MCL 15.232(d)(iv). The foregoing analysis by the circuit court missed a step in the analysis of defining the meaning of the statutory term "funded."

That definition was provided in State Defender Union Employees v. Legal Aid and Defender Association of Detroit, 230 Mich. App. 426, 429 (1998), 485 N.W. 2d 359, 361:

> " . . . This issue presents a question of first impression in Michigan that requires us to ascertain the meaning of the statutory term "funded."
>
> "Because it is not defined in the statute, we must give the term "funded" its plain and ordinary meaning. MCL § 8.3a; MSA § 2.212(l); *In re Forfeiture of Bail Bond*, 209 Mich. App. 540, 544, 531 N.W. 2d 806 (1995). "Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is." *Popma v. Auto Club Ins. Ass'n,* 446 Mich. 460, 470, 521 N.W. 2d 831 (1994). The verb form of fund is commonly understood as meaning "to allocate or provide [a supply of money or monetary resources] for (a program, project, etc.)." *Random House Webster's College Dictionary* (1997), p. 525. Fund is also recognized as being synonymous with "subsidize." *Webster's Collegiate Thesaurus* (1988), p. 331. A subsidy, in turn, is defined as "1. a direct financial

> aid furnished by a government, as to a private commercial enterprise, an individual, or another government. 2. any grant or contribution of money." *Webster's College Dictionary, supra*, p. 1284. Thus, we conclude and hold that, as used in the statute, "funded" should be construed to mean the receipt of a governmental grant or subsidy." (emphasis added).

To complete the definitional process requires a further definition of the term "governmental grant or subsidy." A governmental grant or a subsidy involves the direct transfer of public monies to the subsidized enterprises and uses resources exacted from the taxpayers as a whole. Steele v. Industrial Development Board of Metropolitan Government of Nashville, 301 F.3d 401, p. 438 (CCA 6th August 14, 2002).

Schools do not set aside or allocate any money to fund the MHSAA. There is no financial aid direct or indirect and no grant or subsidy to the MHSAA from any school.

Implicit in the notion of the concept of governmental grant or subsidy is the concept that public monies are involved.

"Public monies" was defined by the Supreme Court of Michigan in Pokorny v. Wayne County, 322 Mich. 10 (1948) as:

> "Public money means those funds which are raised by a governmental unit or agency for the conduct of government and for governmental purposes and not those funds such as the present which incidentally falls in the hands of some governmental agent while such agent is performing his lawful functions."

THIS DOES NOT DESCRIBE THE MHSAA'S FUNDING.

The Court in Pokorny, supra made the further distinction between public and non-public money:

> "The distinction between public and non-public moneys is well stated in 50 C.J. p. 854, §40, where it is said:
>
> > The term 'public funds' means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the stated wherein taxes are levied for public purposes. The term does not apply to special

funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian."

THIS DOES NOT DESCRIBE THE MHSAA'S FUNDING.

This Court further refined the definition of "public funds" in Tiger Stadium Fan Club, Inc. v. The Honorable John Engler, 217 Mich. App. 439, 448 (1996) by defining which type of funds are raised by a governmental unit or agency for the conduct of government for governmental purposes. This Court enumerated the elements as follows:

(1) whether the revenues are paid as a tax or fee pursuant to legislative act;

(2) whether the revenues resulted from the sale, relinquishment, waste or damage of state assets;

(3) whether the revenues were paid as rent to royalties collected from the extraction of non-renewable resources from state owned land;

(4) whether the revenues were designated as a gift or grant of the state;

(5) whether the revenues were received as payment of debts or as penalties;

(6) whether the revenues were raised in settlement of an obligation of or to the state.

NONE OF THESE DESCRIBE THE MHSAA'S FUNDING.

Revenues raised from the sale of tickets to the general public to view interscholastic athletic tournament contests are not converted to public monies because of where the events are played, or who the participants are, or who sells the MHSAA tickets, or how the revenue gets back to the MHSAA. The Michigan High School Athletic Association, Inc. is not funded "by or through state or local authority." The Michigan High School Athletic Association, Inc. is not a public body for the purposes of the Freedom of Information Act.

IV.

MHSAA RESPONSE TO PLAINTIFFS/APPELLANTS' FOIA REQUEST.

The issue raised by Plaintiffs/Appellants was not addressed by either the circuit court or the Court of appeals and accordingly no response is made here.

PRAYER OF RELIEF

For the foregoing reasons the Michigan High School Athletic Association, Inc. asks this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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